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## **International Enforcement Cooperation in Cases of Cross-Border Market Misconduct in View of Regulatory Gaps and Overlaps**

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**INTRODUCTION**

An increase in cross-border securities transactions has resulted in a heightened need for international cooperation. Many issues, however, may arise when multiple securities regulators simultaneously try to enforce their securities regulations. This Article focuses on one of these issues, regulatory overlaps and gaps, and proposes how securities regulators change the current cooperation framework.

Assume that an investor residing in one country, where securities regulator *X* oversees the market, conducts market manipulation in another country, where securities regulator *Y* oversees the market. Under the current primary cooperation framework among securities regulators, the Multilateral Memorandum of Understanding (MMoU) (drafted by the International Organization of Securities Commissions (IOSCO)), *Y* will likely ask for the cooperation of *X* to obtain material

information regarding the investor. Nowadays, this type of cooperation occurs frequently. What happens if, however, *X* also wants to enforce its securities regulation against the investor?

Depending on the nature of the case, there might be a regulatory gap or overlap. For example, *X* may not be willing to share information with *Y*, and *Y* may not be able to find any violations committed by the investor. On the other hand, if *X* can use only criminal proceedings to regulate the conduct, *X* may fail to prosecute the investor. This is due to various reasons such as more demanding procedures generally required in criminal investigations. This means that there is a regulatory gap where no authority may be able to exercise effective regulation.

Alternatively, *Y* might exercise jurisdiction based on the place of conduct, yet *X* might exercise jurisdiction based on the effects of the investor's conduct overseas. When there is a regulatory overlap and parallel investigations by *X* and *Y*, multiple issues can occur. For example, enforcement by one regulator might disturb the other regulator's investigation because of an inadvertent disclosure of the investigation, double jeopardy concerns, or an infringement of a constitutional protection.<sup>1</sup> If so, should there be an international rule regarding the priority between *X* and *Y*?

The following three aspects illustrate the importance of the issues raised above: (1) shortcomings in the current cooperation framework, (2) actual cases where regulators with strong interests were restrained due to international double jeopardy concerns, and (3) adoption in some countries' domestic law of a "broader" version of an international double jeopardy principle that would treat some foreign administrative penalties as the equivalent of criminal penalties.

Many scholars have analyzed relevant issues, including regulatory gaps or overlaps in a broader context;<sup>2</sup> the enhanced authority in, and increased use of, administrative proceedings and their constitutionality

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<sup>1</sup> As I discuss in detail in Parts III and IV, when a regulator gives premature notice of investigation to wrongdoers inadvertently, wrongdoers may hide material evidence or conspire with relevant parties. In a jurisdiction where the international double jeopardy principle is recognized, a securities regulator in the jurisdiction will have to discontinue criminal investigation if securities regulators in another jurisdiction impose criminal penalties. Use of evidence by a regulator in criminal enforcement may infringe upon constitutional protection such as the privilege against self-incrimination if the evidence was obtained by another regulator in administrative investigation.

<sup>2</sup> See, e.g., Robert Wai, *Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization*, 40 COLUM. J. TRANSNAT'L L. 209 (2002).

in the United States;<sup>3</sup> the constitutionality of parallel administrative and criminal proceedings and information exchange between U.S. regulators;<sup>4</sup> and whether the double jeopardy principle should be recognized internationally.<sup>5</sup> They have, however, mostly focused on domestic issues and largely ignored issues that have occurred in international cooperation in securities regulation.

This Article, therefore, seeks to fill this gap by expanding the scope of analysis to the international setting and making specific revisions to the MMoU to contribute to more efficient and effective securities enforcement on a global level. Part I describes the current regulatory framework to combat cross-border market misconduct. Parts II and III focus on regulatory gaps and overlaps, respectively, by explaining why they occur before providing solutions. Part IV discusses recent issues occurring in the intersection of administrative and criminal enforcement against market misconduct in the international setting. This Article concludes by proposing how regulators all over the world can complement each other through the new provision of the MMoU.

## I

### FRAMEWORK OF INTERNATIONAL SECURITIES REGULATION AND ENFORCEMENT

This Part defines market misconduct and describes representative enforcement tools including administrative, civil, and criminal proceedings. This Part also explains that securities regulators have made efforts to cooperate through an international framework to enhance their abilities to investigate and prosecute cross-border market misconduct.

#### *A. Market Misconduct*

In this Article, “market misconduct” refers to insider trading and market manipulation. “Insider trading” is defined as “buying or selling a security, in breach of a fiduciary duty or other relationship of trust and confidence, on the basis of material, nonpublic information

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<sup>3</sup> See, e.g., David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 1155 (2016).

<sup>4</sup> See, e.g., Shiv Narayan Persaud, *Parallel Investigations Between Administrative and Law Enforcement Agencies: A Question of Civil Liberties*, 39 DAYTON L. REV. 77 (2013).

<sup>5</sup> See, e.g., Anthony J. Colangelo, *Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory*, 86 WASH. U. L. REV. 769 (2009).

about the security,”<sup>6</sup> whereas “market manipulation” is defined as “intentional conduct designed to deceive investors by controlling or artificially affecting the market for a security [through, for example] trades to create a false or deceptive picture of the demand for a security.”<sup>7</sup>

There is, however, no single anti-fraud provision to regulate market misconduct globally, and each regulator has its own regulatory regime.<sup>8</sup> For example, in the United States, the Securities and Exchange Commission (SEC or the Commission) and the Department of Justice (DOJ) have used one of the anti-fraud provisions, Rule 10b-5 of the Securities Exchange Act of 1934,<sup>9</sup> to regulate securities fraud including market misconduct.<sup>10</sup>

If securities markets are efficient, they serve as a crucial mechanism in determining an appropriate price for securities, transferring and diversifying various risks among market participants.<sup>11</sup> The determination of an appropriate price, transfer, and diversification of various market risks achieve economic growth and financial stability.<sup>12</sup> The more efficient securities markets are, the more likely these goals will be achieved.<sup>13</sup> Regulatory gaps and overlaps in combating cross-border market misconduct cases, however, impede the efficiency of securities markets.<sup>14</sup>

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<sup>6</sup> *Fast Answers, Insider Trading*, U.S. SEC. & EXCH. COMM’N, <https://www.sec.gov/answers/insider.htm> (last modified May 16, 2018).

<sup>7</sup> *Fast Answers, Manipulation*, U.S. SEC. & EXCH. COMM’N, <https://www.sec.gov/answers/tmanipul.htm> (last modified Mar. 28, 2008).

<sup>8</sup> Junsun Park, *Global Expansion of National Securities Laws: Extraterritoriality and Jurisdictional Conflicts*, 12 U.N.H. L. REV. 69, 69 (2014).

<sup>9</sup> 17 C.F.R. § 240.10b-5 (2016).

<sup>10</sup> Rule 10b-5 has been characterized as “the most far-reaching” catch-all provision. Genevieve Beyea, *Transnational Securities Fraud and the Extraterritorial Application of U.S. Securities Laws: Challenges and Opportunities*, 1 GLOBAL BUS. L. REV. 139, 142 (2011).

<sup>11</sup> Ana Carvajal & Jennifer Elliott, *Strengths and Weaknesses of Securities Market Regulation: A Global Analysis 4* (Int’l Monetary Fund, Working Paper No. WP/07/259, 2007).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> See Ana Carvajal & Jennifer Elliot, *The Challenge of Enforcement in Securities Markets: Mission Impossible?* (Int’l Monetary Fund, Working Paper No. WP/09/168, 2009) (observing that enforcement seems to be the most challenging element for regulators throughout the world).

### ***B. Enforcement Tools***

Some securities regulators can use multiple enforcement tools to regulate market misconduct while other regulators may solely rely on criminal enforcement.<sup>15</sup> For example, the SEC has extensive and preeminent authority under the federal securities laws to pursue three types of enforcement actions: administrative, civil, and criminal.<sup>16</sup>

First, the SEC may seek a variety of sanctions through administrative proceedings, which are presided over by an administrative law judge, who is independent of the Commission.<sup>17</sup> The administrative law judge conducts a hearing, considers the evidence, and issues an initial decision including recommended sanctions such as cease-and-desist orders, suspension or revocation of registrations, civil monetary penalties, and disgorgement.<sup>18</sup>

Second, the Commission can file a civil complaint with a federal district court, seeking various sanctions including an injunction to prohibit any further violations, civil monetary penalties, disgorgement, and bar or suspension of a corporate officer or director.<sup>19</sup> The Commission may bring a case either in federal court or before an administrative law judge, or both, depending on various factors.<sup>20</sup>

Third, the SEC has both a formal and informal process for referring criminal cases to the DOJ.<sup>21</sup> Under the formal process, SEC staff members prepare a criminal reference report for the Commission, which decides whether to refer the case to the DOJ.<sup>22</sup> Under the informal process, which is more often used in practice, a staff member discusses a nonpublic investigation with DOJ prosecutors. The

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<sup>15</sup> See Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883, 909 (2002) (observing that many regulators rely solely on criminal enforcement); see also *About the Division of Enforcement*, U.S. SEC. & EXCH. COMM'N, <https://www.sec.gov/enforce/Article/enforce-about.html> (last modified Aug. 2, 2007) (describing SEC's administrative, civil, and criminal enforcement tools).

<sup>16</sup> *About the Division of Enforcement*, U.S. SEC. & EXCH. COMM'N, <https://www.sec.gov/enforce/Article/enforce-about.html> (last modified Aug. 2, 2007); KIRKPATRICK & LOCKHART PRESTON GATES ELLIS LLP, *THE SECURITIES ENFORCEMENT MANUAL* 3 (Michael J. Missal & Richard M. Phillips eds., 2d ed. 2007).

<sup>17</sup> *How Investigations Work*, U.S. SEC. & EXCH. COMM'N, <https://www.sec.gov/News/Article/Detail/Article/1356125787012> (last modified Jan. 27, 2017).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> KIRKPATRICK & LOCKHART PRESTON GATES ELLIS LLP, *THE SECURITIES ENFORCEMENT MANUAL* 394 (Michael J. Missal & Richard M. Phillips eds., 2d ed. 2007).

<sup>22</sup> *Id.*

Enforcement Division of the SEC also shares investigative files with the DOJ.<sup>23</sup>

### ***C. Current Cooperative Framework: IOSCO and MMoU***

To enhance their abilities to investigate and prosecute cross-border market misconduct, securities regulators have made efforts to cooperate.<sup>24</sup> Because there is no single regulatory authority to govern all securities markets globally, each regulator has tried to apply its domestic securities regulation extraterritorially to regulate cross-border market misconduct.<sup>25</sup> However, because investigatory authority is generally limited within a territory, regulators need assistance from foreign regulators, such as collecting documents from a foreign resident, to enforce their domestic laws.<sup>26</sup> Currently, the DOJ and the SEC can exercise extraterritorial jurisdiction based on the effects or conduct test under the Dodd-Frank Act,<sup>27</sup> but this exercise does not guarantee that they can gather evidence and find the violation.<sup>28</sup>

In today's securities markets, cross-border transactions have become very common and complex. Therefore, activities in one jurisdiction frequently affect securities markets and regulations in other jurisdictions.<sup>29</sup> Those who engage in cross-border market misconduct can organize entities globally, employ overseas transactions, transfer funds across borders, invest in securities in foreign markets, or work with foreign parties, thereby intentionally structuring the schemes through which they seek to avoid regulatory detection.<sup>30</sup> Under such circumstances, international cooperation between securities regulators is crucial.

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<sup>23</sup> *Id.*

<sup>24</sup> Michael D. Mann & William P. Barry, *Developments in the Internationalization of Securities Enforcement*, 9 INT'L LAW. 667, 667 (2005) (observing that regulators have responded to cross-border cases by formalizing cooperation with each other).

<sup>25</sup> Park, *supra* note 8, at 234.

<sup>26</sup> *Id.*; see also J. WILLIAM HICKS, INTERNATIONAL DIMENSIONS OF U.S. SECURITIES LAW § 11:53 (2012) (describing obstacles to SEC in cross-border securities enforcement).

<sup>27</sup> See *infra* Section III.A.1.b (describing the relevant provision of the Dodd-Frank Act).

<sup>28</sup> Park, *supra* note 8, at 243.

<sup>29</sup> See generally Mann & Barry, *supra* note 24.

<sup>30</sup> See Junsun Park, *Enforcement of Securities Law in the Global Marketplace: Cross-Border Cooperation in the Prosecution of Transnational Hedge Fund Fraud*, 39 BROOK. J. INT'L L. 231, 241, 243 (2014) (explaining how hedge funds structure cross-border deals to avoid enforcement).

In 1983, the International Organization of Securities Commission (IOSCO) was founded as “the international body that brings together the world’s securities regulators” and “the global standard setter for the securities sector.”<sup>31</sup> In response to the increase of cross-border securities transactions, securities regulators around the world started cooperating first by entering into bilateral treaties and memoranda of understanding (MoUs).<sup>32</sup> Then, in 2002, the IOSCO created the Multilateral Memorandum of Understanding (MMoU) to set a global cooperation framework among its over one hundred members to consult, cooperate, and exchange information with each other.<sup>33</sup> The MMoU has become a significant cooperation framework among securities regulators.<sup>34</sup>

The success of international cooperation agreements depends on two factors: (1) the degree to which they are used and improved,<sup>35</sup> and (2) the degree to which domestic laws and courts support them.<sup>36</sup> In order to be successful, countries like the United States have established provisions authorizing their securities regulators to provide cross-border assistance.<sup>37</sup> Those provisions allow domestic securities regulators to obtain evidence located abroad and overcome obstacles in enforcing laws against transnational securities fraud.

## II REGULATORY GAP

When a country fails to enforce securities regulations, a regulatory gap forms.<sup>38</sup> Regulatory gaps form for three main reasons. First, a

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<sup>31</sup> *About IOSCO*, INT’L ORG. SEC. COMM’NS, [https://www.iosco.org/about/?subsection=about\\_iosco](https://www.iosco.org/about/?subsection=about_iosco) (last visited Jan. 29, 2018).

<sup>32</sup> See MARC I. STEINBERG, *INTERNATIONAL SECURITIES LAW: A CONTEMPORARY AND COMPARATIVE ANALYSIS* 203 (1999) (describing MoUs generally).

<sup>33</sup> *Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information*, INT’L ORG. SEC. COMM’NS, <https://www.iosco.org/about/?subsection=mmou> (last visited Jan. 29, 2018) [hereinafter MMoU].

<sup>34</sup> See Park, *supra* note 30, at 250–51 (observing that many securities regulators have employed the MMoU mechanisms).

<sup>35</sup> See Mann & Barry, *supra* note 24, at 696 (claiming that agreements are only statements of intent, so the practice of using them needs to be developed).

<sup>36</sup> See *id.* at 687 (claiming that the ability to implement multilateral understanding relies on whether regulators have the authority under the domestic laws).

<sup>37</sup> See, e.g., Securities Exchange Act, 15 U.S.C. § 78u(a)(2) (2015) (authorizing the SEC to provide assistance to foreign authorities).

<sup>38</sup> Joel Trachtman, *Externalities and Extraterritoriality: The Law and Economics of Prescriptive Jurisdiction*, in *ECONOMIC DIMENSIONS IN INTERNATIONAL LAW: COMPARATIVE AND EMPIRICAL PERSPECTIVES* 642, 643 (Jagdeep S. Bhandari & Alan D.

securities regulator may have no authority to prosecute cross-border market misconduct. This occurs when there is no basis for a securities regulator to apply its domestic securities regulation extraterritorially to conduct occurring overseas or to a person residing overseas.<sup>39</sup> Second, a securities regulator may lack authority due to domestic reasons or may have to rely solely on criminal enforcement.<sup>40</sup> Third, even when a securities regulator can apply its domestic securities regulation extraterritorially, it may not achieve effective enforcement because of shortcomings in international cooperation.<sup>41</sup> These three main situations create opportunities for fraudsters to evade regulations, which disrupts market integrity.<sup>42</sup>

### ***A. Sources of Regulatory Gap***

This Part describes how cross-border regulatory gaps occur due to three main reasons: territoriality, lack of domestic authorities, and shortcomings in international cooperation.

#### *1. Territoriality*

If a securities regulator cannot apply its securities regulation extraterritorially, this action would likely lead to a regulatory gap.<sup>43</sup> This territoriality issue had traditionally caused regulatory gaps in securities enforcement.<sup>44</sup> However, in current securities regulation, territoriality may not be a huge obstacle for securities regulators. As discussed in Section III.A.1 below, the extraterritorial application is generally accepted,<sup>45</sup> and it could cause regulatory overlaps rather than regulatory gaps. However, significant issues exist where a securities regulator can apply laws extraterritorially but cannot exercise effective enforcement because of a lack of authority or shortcomings in international cooperation.

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Sykes eds., 1997). Trachtman used the term “regulatory underlaps” to show regulatory gaps that would allow “possible regulatory arbitrage, avoidance or evasion.”

<sup>39</sup> See *infra* note 49 and accompanying text.

<sup>40</sup> See *infra* notes 55–56, 61 and accompanying text.

<sup>41</sup> See *infra* notes 69–73 and accompanying text.

<sup>42</sup> See *infra* notes 74, 76 and accompanying text.

<sup>43</sup> See Guzman, *supra* note 15 (claiming that where jurisdictions could not or did not apply their laws extraterritorially, there will generally be under-regulation in international business).

<sup>44</sup> See *id.*

<sup>45</sup> See *infra* notes 133–35 and accompanying text.

## 2. *Lack of Domestic Authority*

As described below, many members of the IOSCO suffer lack of sufficient authority to obtain necessary information and documents, which is particularly problematic when securities regulators can rely only on criminal enforcement.

### *a. IOSCO Assessment*

Effective securities regulators must have the authority to obtain all necessary information and documents during both supervision and enforcement and, if a violation is found, to penalize such noncompliance.<sup>46</sup> However, securities regulators in many countries seem to lack the ability to effectively enforce regulation.<sup>47</sup> The greatest challenges facing enforcement powers of regulators include (1) a lack of independence from the government and its political process, (2) a lack of legal authority, and (3) a lack of resources, all of which prevent the operation of an effective and credible enforcement program.<sup>48</sup>

The greatest challenges can be seen in many countries where securities regulators lack authority or have difficulties in accessing information from nonregulated persons.<sup>49</sup> Also, in some jurisdictions, securities regulators lack comprehensive investigative and enforcement authority, such as the ability to enter premises for investigation and compel testimony from individuals.<sup>50</sup> Many securities regulators have to rely on the criminal authorities and sanctions,<sup>51</sup> which could hinder their credibility and effectiveness, as discussed in the next subsection. Even in jurisdictions with adequate supervisory programs, scarce disciplinary powers and a lack of skilled personnel are consistent problems.<sup>52</sup>

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<sup>46</sup> Carvajal & Elliot, *supra* note 11, at 19.

<sup>47</sup> This is according to the assessment of regulatory systems of seventy-four countries conducted by the IOSCO between 1999 and 2007. *Id.* at 9. The assessment is not publicly available, but a working paper prepared by the IMF analysts shows a detailed analysis of the assessment. *Id.* at 10.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 15; see also Mann & Barry, *supra* note 24, at 667 (observing that regulators usually do not have access to all information).

<sup>50</sup> Carvajal & Elliot, *supra* note 11, at 19.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

*b. Problems in Criminal Enforcement*

Many securities regulators have only the authority to impose criminal sanctions,<sup>53</sup> but enforcing criminal sanctions has its own set of problems.<sup>54</sup> Ideally, securities regulators would have a variety of enforcement tools so they could pursue enforcement remedies or sanctions best suited for a variety of cases and to sufficiently deter wrongdoing. For example, the SEC can use various enforcement tools in criminal, civil, and administrative proceedings.<sup>55</sup>

Even if securities regulators can use both criminal and administrative enforcement tools, in some countries criminal and administrative authorities cannot easily share information because they are not considered counterparts.<sup>56</sup> Administrative regulators usually do not have the authority to prosecute and must rely on a separate criminal authority with prosecutorial jurisdiction.<sup>57</sup> Criminal authorities generally have to focus their limited resources on a select number of cases, such as the most egregious or high-profile ones.<sup>58</sup> The heightened burden of proof in criminal proceedings may prevent many cases from being initiated.<sup>59</sup> Criminal prosecutors may not have expertise in very technical areas of securities regulation.<sup>60</sup>

In the hypothetical case presented in the Introduction, if *X* can only use criminal proceedings to regulate conduct by the residents of *X*, then, *X* may refrain from imposing criminal sanctions on the conduct. This could be because the conduct is not sufficiently culpable if illegal profits gained by the conduct are nominal. *X* may also be hindered due to the large amount of time it takes to pursue criminal charges because of the demanding procedures generally required in criminal investigations. *Y*'s possible sanction, whether criminal, civil, or administrative, may not be effective upon the wrongdoer who resides in a foreign country. This is because the wrongdoer may ignore *Y*'s order and move to a different market. Thus, even when there is an

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<sup>53</sup> *Id.*

<sup>54</sup> *See infra* notes 66–67 and accompanying text.

<sup>55</sup> *See supra* Section I.B (describing the SEC's enforcement tools).

<sup>56</sup> Carvajal & Elliot, *supra* note 14, at 18.

<sup>57</sup> *Id.* at 19.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

overlap in legislation, there might be a regulatory gap where no authority exists that can exercise effective regulation.

### 3. *Shortcomings in International Cooperation*

The law governing domestic securities regulators' participation in international cooperation has continued to evolve, but the law is "not fully harmonized with international . . . initiatives."<sup>61</sup> Many countries face barriers that prevent securities regulators from fully cooperating with foreign authorities.<sup>62</sup> The MoUs also expressly recognize that there may be limitations on the ability of securities regulators under domestic laws.<sup>63</sup>

According to a survey conducted by the IOSCO, about forty percent of member jurisdictions have encountered challenges in their ability to share information and documents with other domestic and foreign securities regulators.<sup>64</sup> Those challenges include (1) the lack of authority to share confidential information such as banking information; (2) the condition of "dual illegality," which requires that conduct be illegal in both requesting and requested countries; and (3) the lack of authority to share information regarding criminal matters.<sup>65</sup>

In some countries, there are no clear provisions that allow regulators to share information and documents at the domestic level.<sup>66</sup> In addition, some securities regulators have not actively participated in effective mechanisms for cross-border coordination and the exchange of information.<sup>67</sup> Differing perceptions of whether a legal proceeding is criminal, civil, or administrative will "impact evidence gathering and information sharing between [securities] regulators."<sup>68</sup> In addition, securities regulators that have not actively enforced their own market

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<sup>61</sup> Mann & Barry, *supra* note 24, at 668.

<sup>62</sup> *Id.* at 687.

<sup>63</sup> *Id.* For example, Article 6(e) of the MMoU provides that "[a] request for assistance may be denied by the Requested Authority [(meaning a regulator that received a request for assistance)]: (i) where the request would require the Requested Authority to act in a manner that would violate domestic law." MMoU, *supra* note 33, at Art. 6(e).

<sup>64</sup> Carvajal & Elliot, *supra* note 11, at 20.

<sup>65</sup> *Id.* at 36.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> Mann & Barry, *supra* note 24, at 668.

misconduct regulations may not be supportive of foreign regulators either.<sup>69</sup>

#### *4. Problems of Regulatory Gap*

Even if every securities regulator filled the domestic regulatory gaps, fraudsters could structure cross-border securities transactions and evade regulation. If laws do not hold fraudsters accountable and defrauded investors cannot seek adequate remedies, investors will lose confidence in securities markets, and integrity will be compromised.<sup>70</sup> This situation also negatively affects liquidity and prices in securities markets around the world.<sup>71</sup>

### ***B. Solutions for Regulatory Gap***

What can securities regulators, as an international group, do to solve the cross-border regulatory gaps? Here, I propose three actions that can be taken to overcome regulatory gaps: (1) taking initiative to improve “weak” regulation; (2) strengthening international cooperation; and (3) introducing civil or administrative enforcement.

#### *1. Improvement of Weak Regulation*

Securities regulators’ own initiative should improve their “weak” regulation, such as issues of territoriality and lack of domestic authority. However, the IOSCO may take initiative by introducing best practices so that “weak” regulators can improve their regulation by following the best practices. For example, in response to regulatory gaps in relation to hedge funds, the IOSCO promulgated sets of principles and best practices to promote transparency of the hedge fund industry while preserving liquidity that hedge funds provide to the market.<sup>72</sup> Also, in response to regulatory gaps caused by technological

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<sup>69</sup> Chien-Chung Lin, *Insider Trading Law in East Asia and Enforcement: Japan, China, Hong Kong and Taiwan* Visite § III.2, § IV.1 (July 17, 2013) (unpublished paper) [https://works.bepress.com/chien\\_chung\\_lin/6/](https://works.bepress.com/chien_chung_lin/6/). For example, in China, though insider trading has been prohibited since the early 1990s, “enforcement had been inactive for a long period” until around 2010. *Id.* § III.2.

<sup>70</sup> Beyea, *supra* note 10, at 154.

<sup>71</sup> *Id.*

<sup>72</sup> Cecilia C. Lee, *Reframing Complexity: Hedge Fund Policy Paradigm for the Way Forward*, 9 BROOK. J. CORP. FIN. & COM. L. 478, 514, n.201 (2015).

developments, the IOSCO prepared a report assessing challenges posed by technological changes such as the increased speed of trading.<sup>73</sup>

### *2. Strengthening of International Cooperation*

In response to shortcomings of international cooperation, the ultimate solution to reduce regulatory gaps is to strengthen the existing international cooperation framework. The IOSCO has already started strengthening the existing framework. In February 2016, the President's Committee of the IOSCO endorsed a draft to amend the MMoU, which provides the framework for additional assistance in areas including the following: (a) sharing auditing information, (b) sharing subscriber records held or maintained by telephone service providers, (c) sharing subscriber records held or maintained by internet service providers, (d) sharing recordings of telephone conversations or other electronic communications held or maintained by regulated persons, (e) compelling a person's physical attendance to take or compel that person's statement or testimony under oath, and (f) freezing assets.<sup>74</sup>

Also, international cooperation described in Section III.C.2 below as a solution for regulatory overlap should work in reducing regulatory gaps.<sup>75</sup> For example, securities regulators can discuss at an early stage who is best suited to pursue enforcement. The regulators consider various factors such as whether extraterritorial application of domestic securities regulation would be allowed, and which regulator has stronger interest, expertise, and resources.

### *3. Introduction of Civil or Administrative Enforcement*

Another solution for regulatory gaps would be to introduce civil or administrative enforcement to supplement criminal enforcement. In this context, introduction of civil or administrative enforcement to compensate for shortcomings of criminal enforcement in Australia and Japan provide great examples.<sup>76</sup>

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<sup>73</sup> INT'L ORG. SEC. COMM'NS, TECHNOLOGICAL CHALLENGES TO EFFECTIVE MARKET SURVEILLANCE ISSUES AND REGULATORY TOOLS (2013), <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD412.pdf>.

<sup>74</sup> See Int'l Org. Sec. Comm'ns Res. 2/2016 (Feb. 2016), <https://www.iosco.org/library/resolutions/pdf/IOSCORES60.pdf>.

<sup>75</sup> *Id.* § IV.C.2.

<sup>76</sup> See Carvajal & Elliot, *supra* note 14 (arguing that it is necessary for securities regulators to have an option to directly prosecute matters in civil or administrative proceedings).

The IOSCO could share these best practices of introducing administrative enforcement with regulators that have solely relied on criminal enforcement. In the hypothetical case presented in the Introduction, for example, *X* and *Y* may conduct parallel administrative and criminal investigations where *X* seeks to impose a criminal sanction on the investor residing within its jurisdiction and *Y* seeks to impose an administrative monetary penalty on the investor. By doing so, *X* and *Y* together can send a strong message to the markets. Also, even if *X* fails or takes too much time to impose the criminal sanction, the investor may be deterred from further misconduct by *Y*'s prompt action. Moreover, if *Y* only had criminal enforcement, *X* might be prohibited under its domestic laws from sharing self-incriminating evidence obtained from the investor. But, introduction of administrative enforcement by *Y* would enable such information sharing.

*a. Australia's Civil Penalty*

In Australia, a civil penalty regime was introduced in 1993, aiming to reduce the role of criminal penalties, which applied only to the most serious misconduct.<sup>77</sup> The Australian Securities and Investments Commission (ASIC) had faced difficulties in enforcement because only criminal penalties were available.<sup>78</sup> The ASIC considered that the need to satisfy criminal rules of evidence and the higher standard of proof in criminal proceedings made criminal penalties an inefficient and inflexible enforcement tool for securities regulation.<sup>79</sup> The civil penalty regime, therefore, was introduced for the ASIC to reduce reliance on the criminal penalties and to deal more effectively with misconduct.<sup>80</sup> The ASIC has succeeded in many civil cases, particularly in corporate enforcement.<sup>81</sup>

Due to enhanced procedural protections afforded to defendants, however, the ASIC's ability to rely on the civil penalty regime has been undermined.<sup>82</sup> In Australia, civil penalties are considered a "hybrid

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<sup>77</sup> Vicky Comino, *Effective Regulation by the Australian Securities and Investments Commission: The Civil Penalty Problem*, 33 MELB. U. L. REV. 802, 804 (2009).

<sup>78</sup> *Id.* at 805.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 810.

between the civil and the criminal law” and “punitive civil sanctions.”<sup>83</sup> As a consequence, the defendants in civil penalty proceedings are awarded the penalty privilege, a weak form of the privilege against self-incrimination.<sup>84</sup> In addition, the standard of proof for civil penalty proceedings requires a higher level of proof than the one for ordinary civil proceedings.<sup>85</sup> The courts must find that a violation has occurred and that the consequences are serious.<sup>86</sup> These procedures should be changed so that civil enforcement can be as effective a tool as administrative enforcement,<sup>87</sup> which is discussed next.

*b. Japan’s Administrative Monetary Penalty*

In Japan, the administrative monetary penalty system for market misconduct was introduced in 2005 “to conduct investigations to impose administrative monetary penalties to the SESC.”<sup>88</sup> The measure is intended to achieve “the administrative objective of preventing misconduct and ensuring effectiveness of the regulation.”<sup>89</sup> If the Securities and Exchange Surveillance Commission (SESC) finds market misconduct, it may make a recommendation to the Prime Minister and the Commissioner of the Financial Services Agency to issue an order to pay an administrative monetary penalty through an administrative trial procedure.<sup>90</sup>

The SESC has actively used administrative monetary penalties to police market misconduct. Between fiscal years 2014 and 2018, the number of recommendations for administrative monetary penalties were one hundred and twenty-six cases for insider trading and forty-one cases for market manipulation.<sup>91</sup> During the same period, the

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<sup>83</sup> *Id.* at 811 (citing *Rich v. Australian Securities and Investments Commission* (2004) 220 CLR 129, 172 (Austl.); JOHN FARRAR, CORPORATE GOVERNANCE: THEORIES, PRINCIPLES AND PRACTICE 245 (3d ed. 2008)). But see *id.* at 813 (quoting Vicky Comino, *The Challenge of Corporate Law Enforcement in Australia*, 23 AUSTL. J. CORP. L. 233, 248 (2009)) (arguing that the imposition of civil penalties does not implicate the same level of moral culpability and does not have the same level of deterrent effects as criminal penalties, so the civil penalties are not punitive in nature).

<sup>84</sup> *Id.* at 811, 815.

<sup>85</sup> *Id.* at 820.

<sup>86</sup> *Id.*

<sup>87</sup> See *id.* at 829–30 (claiming that legislatures should enact a “new procedural roadmap” to govern the law and procedure of the civil penalty proceedings).

<sup>88</sup> SEC. & EXCH. SURVEILLANCE COMM’N, INITIATIVES: BUILDING ON A QUARTER-CENTURY OF ACHIEVEMENT 6 (2016), <http://www.fsa.go.jp/sesc/english/aboutsesc/all.pdf>.

<sup>89</sup> *Id.* at 7.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 21.

number of criminal charges filed by the SESC was only twelve for insider trading and eight for market manipulation.<sup>92</sup>

The administrative monetary penalties have been used in some novel and challenging cases by the SESC. For example, some of the cases involved market manipulation made by automatic orders placed by algorithmic traders or through orders placed with multiple securities brokers.<sup>93</sup> There was also a case where market manipulation was conducted through transactions on both a proprietary trading system (PTS), which is a market trading system established and operated by a securities firm, and a major stock exchange.<sup>94</sup> In that case, a trader placed false orders before the opening of the morning session of the stock exchange, thereby boosting quotations, and executed orders on the PTS.<sup>95</sup> The SESC might not have been able to enforce against these cases if it had relied solely on its criminal investigative proceedings, which are used in a limited number of cases and require the highest burden of proof.<sup>96</sup>

### III REGULATORY OVERLAP

In this Article, a “regulatory overlap” means securities regulators in more than two jurisdictions try to regulate the same course of conduct in a particular single market. In this Part, I clarify when a regulatory overlap occurs in international business and securities regulation generally, analyze how the existence of a regulatory overlap causes problems for market participants and securities regulators, and propose solutions that securities regulators can employ.

#### *A. Sources of Regulatory Overlap*

A regulatory overlap may occur in two settings: (1) when multiple regulators try to enforce their regulations concurrently,<sup>97</sup> and (2) when

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<sup>92</sup> *Id.*

<sup>93</sup> SEC. & EXCH. SURVEILLANCE COMM’N, ANNUAL REPORT 2015/2016 120 (2016), <http://www.fsa.go.jp/sesc/english/reports/re2015.pdf>.

<sup>94</sup> *Id.* at 122.

<sup>95</sup> *Id.*

<sup>96</sup> See *supra* Section II.A.2.b (explaining difficulties in criminal enforcement).

<sup>97</sup> Stephen J. Choi & Andrew T. Guzman, *The Dangerous Extraterritoriality of American Securities Law*, 17 NW. J. INT’L L. & BUS. 207, 235 (1996).

a regulator tries to enforce its regulation as a “carbon copy” enforcement after another regulator has enforced its regulation.<sup>98</sup>

### *I. Concurrent Jurisdiction*

Historically, regulators may have been limited in applying their own domestic laws by the principle of territoriality.<sup>99</sup> Currently, however, a certain degree of extraterritorial application is generally accepted, though the proper basis and scope of such application are still debated.<sup>100</sup> In this subsection, I examine tests for extraterritorial application such as the conduct and effect tests, I discuss a seminal United States Supreme Court case that introduced the transaction test and a material federal statute on extraterritorial application, and I examine how the SEC exercises extraterritorial jurisdiction.

#### *a. Conduct and Effects Tests*

In the United States, the Second Circuit, and other federal courts, has developed the “conduct” and the “effects” tests.<sup>101</sup> Under the conduct test, courts will have subject matter jurisdiction when “substantial acts in furtherance of the fraud” occurred in the United States.<sup>102</sup> In order to satisfy the conduct test, “(1) the defendant’s activities in the United States [must be] more than ‘merely preparatory’ to a securities fraud conducted elsewhere, and (2) these activities or culpable failures to act within the United States [must have] ‘directly caused’ the claimed losses.”<sup>103</sup>

While the conduct test focuses on the place of the conduct, the effects test focuses on harm to U.S. markets or investors. Under the effects test, the U.S. courts will have subject matter jurisdiction when “the wrongful conduct had a substantial effect in the United States or upon United States citizens.”<sup>104</sup> Effects must be strong enough to

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<sup>98</sup> See *infra* notes 133–35 and accompanying text.

<sup>99</sup> See Beyea, *supra* note 10, at 145 (citing *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909)).

<sup>100</sup> See Beyea, *supra* note 10, at 145 (citing Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883 (2002)).

<sup>101</sup> Beyea, *supra* note 10, at 146–47.

<sup>102</sup> *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1045 (2d Cir. 1983).

<sup>103</sup> *Itoba Ltd. v. LEP Group PLC*, 54 F.3d 118, 122 (2d Cir. 1995) (internal citation omitted).

<sup>104</sup> *Sec. & Exch. Comm’n v. Berger*, 322 F.3d 187, 192 (2d Cir. 2003).

generate “foreseeable and substantial harm to interests in the United States,”<sup>105</sup> and mere adverse effects are insufficient.<sup>106</sup>

The conduct test and the effects test were criticized as risking unsettled and excessive expansion of national laws that could infringe upon other sovereigns, and thereby harm international relations.<sup>107</sup> Under the conduct test, when significant conduct occurs in multiple jurisdictions, all jurisdictions may have enough activity within their borders to exercise jurisdiction.<sup>108</sup> This is particularly true for securities transactions.<sup>109</sup> Similarly, cross-border securities transactions likely have an effect in multiple jurisdictions, so the effects test also allows extraterritorial application by multiple jurisdictions.

*b. Morrison Decision and the Dodd-Frank Act*

Recognizing the risk of unsettled and excessive expansion of national laws, the United States Supreme Court overruled the conduct test and the effects test and introduced a new test, the transactional test.<sup>110</sup> The Court held in *Morrison v. National Australia Bank Ltd.* that Section 10(b) applied to fraudulent action involving “transactions in securities listed on domestic exchanges” and “domestic transactions in other securities.”<sup>111</sup> The Court reasoned that the conduct test and the effects test were problematic because the tests made it very difficult to anticipate when anti-fraud provisions applied to a transaction.<sup>112</sup>

The *Morrison* decision, however, made a loophole for fraudsters.<sup>113</sup> A person who violated U.S. securities regulations could avoid application of anti-fraud provisions by executing trading outside the United States.<sup>114</sup> The U.S. Congress added a new provision in the Dodd-Frank Act to close the loophole. Under Section 929P(b) of the Dodd-Frank Act, the SEC and the DOJ may exercise extraterritorial jurisdiction against “conduct within the United States that constitutes

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<sup>105</sup> *Tamari v. Bache & Co. S.A.L.*, 730 F.2d 1103, 1108 (7th Cir. 1984).

<sup>106</sup> *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 989 (2d Cir. 1975).

<sup>107</sup> *Park*, *supra* note 8, at 73.

<sup>108</sup> *Choi & Guzman*, *supra* note 97, at 218.

<sup>109</sup> *Id.*

<sup>110</sup> *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 268 (2010).

<sup>111</sup> *Id.* at 267.

<sup>112</sup> *Id.* at 257–61.

<sup>113</sup> *See Park*, *supra* note 8, at 77 (providing an example where a chemist obtained confidential information from the U.S. FDA and traded securities on a Chinese exchange).

<sup>114</sup> *Id.*

significant steps in furtherance of the violation” or “conduct occurring outside the United States that has a foreseeable substantial effect within the United States.”<sup>115</sup> Therefore, even if conduct does not meet the transaction test, the SEC and the DOJ can exercise extraterritorial application of anti-fraud provisions under the Dodd-Frank Act by using the effects or conduct test.<sup>116</sup>

Potential issues remain in cross-border cases with overlapping jurisdictions. Because Section 929P(b) mirrors words used in cases before *Morrison*, the meaning of phrases such as “significant steps in furtherance of the violation” and “a foreseeable substantial effect” are still unclear.<sup>117</sup> Because the test leaves a lot of ambiguity, a court can make decisions. Depending on the specific facts in a particular case, the SEC and the DOJ can exercise extraterritorial jurisdiction arbitrarily even when the United States’ interest is only nominal.<sup>118</sup> This, in turn, could lead to regulatory overlaps if the claims by the SEC or the DOJ, based on the conduct or the effects test, overlap with claims from foreign regulators.<sup>119</sup>

*c. Practice of the SEC*

Many of the SEC’s cross-border market misconduct cases used to be “simply the outgrowths of cases that were primarily domestic in nature.”<sup>120</sup> Recently, however, market misconduct has increasingly involved significant overseas conduct, and “the jurisdictional nexus between the suspicious conduct and U.S. markets is increasingly attenuated.”<sup>121</sup>

For example, *Security and Exchange Commission v. Tiger Asia Management* is an insider trading case in which a U.S. resident, Sung Kook Hwang, the founder and portfolio manager of U.S.-based Tiger Asia Management and Tiger Asia Partners (Tiger Asia), is alleged to

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<sup>115</sup> 15 U.S.C. § 78aa(b) (2015). Note that the transaction test still applies to private parties.

<sup>116</sup> *Id.* Note that the transaction test still applies to litigation by private parties.

<sup>117</sup> Park, *supra* note 8, at 80.

<sup>118</sup> *Id.* at 80–81.

<sup>119</sup> *See id.* at 81 (stating “[t]he effects and conduct tests restored by the Dodd-Frank Act result in claims that overlap with those of other countries’ transactional tests”).

<sup>120</sup> Michael Feldberg, *U.S. Insider Trading Enforcement Goes Global*, HARV. L. SCH. F. CORP. GOVERNANCE & FIN. REG. (May 26, 2013), <https://corpgov.law.harvard.edu/2013/05/26/u-s-insider-trading-enforcement-goes-global/> (describing trends in parallel proceedings in insider trading cases).

<sup>121</sup> *Id.* (observing insider trading cases where the nexus with the U.S. markets was attenuated).

have ordered trading of a Chinese bank's shares listed on the Hong Kong Stock Exchange, knowing insider information regarding private placements.<sup>122</sup> After the parallel criminal and civil proceedings in the United States, Tiger Asia agreed to pay a total of USD \$44 million in disgorgement and penalties.<sup>123</sup> Even though this matter involved substantial conduct in the United States (e.g., obtaining insider information and placing orders in the United States), the market harmed by the conduct was in Hong Kong.<sup>124</sup> The Hong Kong regulator, however, gave up a criminal investigation of the matter because the DOJ had already secured a criminal conviction against the firm.<sup>125</sup> This case illustrates that a securities regulator with a strong interest may be prevented from prosecuting securities violations because of enforcement by another securities regulator.

There is a good example of regulatory overlap and cooperation in a cross-border insider trading case in the United States and the United Kingdom. In *SEC v. McClellan*, a partner of an accounting firm and the partner's wife, both of whom were residents of the United States, allegedly leaked confidential merger and acquisition information from the partner's clients to the partner and his wife's family members in the United Kingdom.<sup>126</sup> The family members then either took financial positions in shares of U.S. companies or leaked the information to colleagues.<sup>127</sup> The SEC, the DOJ, and the U.K. Financial Services Authority (FSA) conducted parallel investigations into the matter.<sup>128</sup> The SEC filed insider trading charges against the partner and his wife,

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<sup>122</sup> Complaint at 1–2, Sec. & Exch. Comm'n v. Tiger Asia Mgmt., et al., No. 12-cv-7601 (DMC) (Dec 12, 2012).

<sup>123</sup> Sec. & Exch. Comm'n v. Tiger Asia Mgmt., et al., No. 12-cv-7601 (DMC) (Dec. 13, 2012).

<sup>124</sup> *See id.* In some other cases, the SEC exercised its jurisdiction where substantial conduct occurred only outside the United States. *See, e.g.*, Press Release, Sec. & Exch. Comm'n, SEC Freezes Assets in Swiss-Based Account Used in Suspected Insider Trading Ahead of Heinz Acquisition (Feb. 15, 2013) (involving suspicious trading by unknown foreign traders ahead of the public announcement of the acquisition of Heinz).

<sup>125</sup> Hong Kong law prohibits a prosecution when there is a final judgment of acquittal or conviction in another country under the international double jeopardy doctrine. VICTOR HO WAI-KIN, *CRIMINAL LAW IN HONG KONG* 58 (Kluwer Law International, 2011).

<sup>126</sup> Litigation Release No. 21758, Sec. & Exch. Comm'n, Sec. & Exch. Comm'n v. McClellan, Case No. CV-105412 (JCS) (N.D. Cal. filed Nov. 30, 2010) [hereinafter SEC Litigation Release].

<sup>127</sup> *Id.*

<sup>128</sup> Press Release, Fed. Sec. Agency, FSA, SEC and DOJ Investigation Leads to Two People Being Charged by the SEC with Insider Dealing in the U.S. (Dec. 1, 2010).

but not against the family members in the United Kingdom.<sup>129</sup> The FSA, on the other hand, charged five individuals in the United Kingdom who either traded shares of the U.S. companies or disclosed the information to others<sup>130</sup> for violation of Section 52 of the Criminal Justice Act 1993.<sup>131</sup> The SEC took a civil enforcement action against U.S. residents while the FSA filed criminal charges against U.K. residents.<sup>132</sup> This case shows that the problem of duplicate recovery, discussed in Section B.1 below, may be overcome if affected regulators can take actions against different parties.

## 2. Carbon Copy Prosecution

Regulatory overlaps exist not only when two securities regulators exercise jurisdiction concurrently but also when there is a follow-up “carbon copy” prosecution, which is defined as “successive, duplicative prosecutions by multiple sovereigns for conduct transgressing the laws of several nations, but arising out of the same common nucleus of operative facts.”<sup>133</sup> Some practitioners observed that in recent cases under the Federal Corrupt Practices Act (FCPA) while the United States was the global anti-corruption leader, a corporation reaching a negotiated resolution with U.S. authorities faced the risk that other countries would initiate prosecutions based on the same facts.<sup>134</sup> More jurisdictions have been actively enacting and enforcing their own local anti-corruption laws.<sup>135</sup> “As globalization makes the world smaller . . . carbon-copy prosecutions will increase in frequency, size, scope, and force.”<sup>136</sup>

An empirical analysis found strong statistical correlation between extraterritoriality and national policy implementation: the odds of a

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<sup>129</sup> SEC Litigation Release, *supra* note 126. The SEC later settled with the wife and filed a request for dismissal of claims against the partner. *Id.*

<sup>130</sup> Press Release, Fed. Sec. Agency, Five Charged with Insider Dealing (Nov. 25, 2010) [hereinafter FSA Press Release].

<sup>131</sup> Criminal Justice Act 1993, § 52 (Eng.).

<sup>132</sup> SEC Litigation Release, *supra* note 126; FSA Press Release, *supra* note 130.

<sup>133</sup> Andrew S. Boutros & T. Markus Funk, “Carbon Copy” Prosecutions: A Growing Anticorruption Phenomenon in a Shrinking World, 2012 U. CHI. LEGAL F. 259, 269 (2012).

<sup>134</sup> *See id.* at 260 (providing a case in which Nigerian authorities sought criminal penalties from a U.S. company that had settled with the DOJ).

<sup>135</sup> *Id.* at 270.

<sup>136</sup> *Id.* at 298; *see also* Sarah C. Kaczmarek & Abraham L. Newman, *The Long Arm of the Law: Extraterritoriality and the National Implementation of Foreign Bribery Legislation*, 65 INT’L ORG. 745, 745 (2011) (observing that even though legal systems and sovereignty were traditionally territorial, courts and regulators have applied and enforced national law to conduct transpiring outside their physical territory).

country enforcing its first anti-corruption case were twenty times greater if a country had experienced extraterritorial application of the FCPA.<sup>137</sup> The correlation suggests that powerful regulators in larger markets can induce political activism in other jurisdictions where enforcement is weak, because the “stronger” regulator may provide legitimacy and attention to advocates and opponents of ruling parties.<sup>138</sup> Also, decisions from strong regulators such as the DOJ and the SEC may have multiplying but unintentional spillover effects, altering national decision-making in other jurisdictions.<sup>139</sup> “Weaker” regulators may follow “stronger” regulators simply in order to collect substantial penalties from wealthy corporations. While carbon copy prosecutions of market misconduct may have a positive effect by helping “weaker” jurisdictions step up, and by not disturbing other regulators, there may be problems such as increased compliance costs for market participants and duplicative recovery, as described below.

### ***B. Problems of Regulatory Overlap***

Regulatory overlaps could potentially cause problems not only for market participants such as investors and issuers through increased compliance costs but also for regulators themselves through disturbance of each other’s enforcement.<sup>140</sup>

#### *1. Increased Compliance Costs*

The cost of compliance could be burdensome to foreign issuers because they may have to comply with all rules of relevant jurisdictions, which may contradict each other.<sup>141</sup> Foreign issuers would be concerned about the uncertainty of potential liability under U.S. anti-fraud provisions, and the concern would have a chilling effect on their economic activities in the United States because foreign issuers

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<sup>137</sup> Boutros & Funk, *supra* note 133, at 747.

<sup>138</sup> *Id.* at 748–50.

<sup>139</sup> *Id.* at 765.

<sup>140</sup> See William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT’L L. J. 101, 152 (1998) (claiming that disadvantages are conflicts with foreign nations and undue burdens on international business actors).

<sup>141</sup> See Beyea, *supra* note 10, at 155 (pointing out the effect of uncertainty regarding extraterritorial application); Trachtman, *supra* note 38, at 643 (claiming that regulatory overlaps could increase compliance costs or be contradictory).

may limit their business<sup>142</sup> or try to keep material information outside the United States.<sup>143</sup> Foreign regulators may also refrain from cooperating with U.S. regulators if they learn that their targets are domestic nationals whose conduct occurred only outside the United States.<sup>144</sup>

Regulatory overlaps may also result in duplicate or excessive sanctions if each regulator or court gives no consideration to sanctions imposed in other jurisdictions.<sup>145</sup> Regulators may be criticized for penalties that are too harsh and beyond what is required for appropriate deterrence of market misconduct. Regulators need to “ensure that proposed sanctions concerning the same/similar misconduct give a coherent message so as to achieve credible deterrence, while preventing a defendant from being unfairly penalized.”<sup>146</sup>

## 2. *Disturbance of Other Regulators*

Regulatory overlaps can be costly for not only market participants but also for regulators themselves.<sup>147</sup> One regulator’s exercise of extraterritorial enforcement may disturb investigation or enforcement by other regulators for two main reasons.

First, extraterritorial enforcement can prevent other regulators from continuing enforcement due to international double jeopardy concerns. In jurisdictions such as the United Kingdom and Canada, a prosecution in one country is prohibited when there is a final judgment of acquittal or conviction in another country under the international double jeopardy principle.<sup>148</sup> Therefore, if regulators in two jurisdictions, both

<sup>142</sup> See Beyea, *supra* note 10, at 155 (claiming that if *Morrison* court had upheld the conduct and effects test broadly, many foreign issues would have been discouraged from investing).

<sup>143</sup> Richard W. Painter, *The Dodd-Frank Extraterritorial Jurisdiction Provision: Was It Effective, Needed or Sufficient?*, 1 HARV. BUS. L. REV. 195, 217 (2011).

<sup>144</sup> See *id.*

<sup>145</sup> See Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT’L L. 14, 60 (2007) (observing that a court in one jurisdiction may not condition settlement or judgment on release of all future claims).

<sup>146</sup> Int’l Org. of Sec. Comm’ns (IOSCO), *Joint Cross-Border Investigations and Related Proceedings*, at 23 (Feb. 2014) (on file with author) [hereinafter IOSCO Report].

<sup>147</sup> See Beyea, *supra* note 10, at 156 (emphasizing the burden of regulators when other regulators try to exercise jurisdiction on a tenuous contact).

<sup>148</sup> See Colangelo, *supra* note 5, at 817–18 (describing the international double jeopardy principle in the United Kingdom and Canada). In the United States, however, under the dual sovereignty doctrine, even if a defendant has already been convicted or acquitted in a foreign country, the defendant may be tried again for the same offense. See *United States v.*

of which recognize the international double jeopardy principle, investigate the same matter, the regulator who convicts first can prevent the other from prosecuting. Regulators should avoid a situation where a regulator concludes an action that may nullify the action of other jurisdictions. These circumstances may also allow wrongdoers to engage in forum shopping to find the most favorable jurisdiction.<sup>149</sup>

Second, even in cases where no double jeopardy concerns are implicated, investigations and enforcement by multiple regulators on the same person can adversely affect each other. For example, one regulator's decision to seek settlement might have a "significant bearing" upon other regulators because "the litigation posture of a person charged with a violation may alter considerably" after the settlement.<sup>150</sup> It may also lead to an inadvertent disclosure of the investigation when one regulator's investigation gives premature notice to wrongdoers, giving them an opportunity to hide material evidence or conspire with relevant parties. In addition, if one regulator compels a wrongdoer to appear or produce documents, both of which take time, the other regulator might be prevented from contacting the person in a timely manner. Sharing of information between the two regulators may also be difficult.<sup>151</sup>

### ***C. Solutions***

Given increasingly integrated securities markets, it is increasingly challenging for regulators to avoid inefficient regulatory overlaps while filling regulatory gaps.<sup>152</sup> Here, I propose two solutions so that regulators can maintain the integrity of the markets while avoiding overburdening investors and other regulators. One solution is to limit extraterritorial jurisdiction to a reasonable level, and the other is to

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Richardson, 580 F.2d 946, 947 (9th Cir. 1978) (holding that Guatemalan convictions did not bar prosecution by the United States).

<sup>149</sup> See Beyea, *supra* note 10, at 156 (arguing that, if the intensity of enforcement or available remedies are diversified, investors may engage in forum shopping to find the most favorable jurisdiction in which to bring their suit).

<sup>150</sup> IOSCO Report, *supra* note 146, at 22.

<sup>151</sup> When multiple regulators try to share documents and information from a defendant, the protections and rights available in each jurisdiction may be different. Information exchange may be hindered depending on what type of proceedings are pursued.

<sup>152</sup> See Beyea, *supra* note 10, at 154 (explaining the difficulty to regulate securities markets by sufficiently preventing transnational securities misconduct while avoiding costly and inefficient overregulation).

coordinate enforcement actions through the international cooperation framework.

### *1. Limitation of Extraterritorial Application*

Because extraterritorial application of U.S. securities regulation imposes a costly burden on capital mobility,<sup>153</sup> various approaches have been proposed to limit extraterritorial application as I describe in this section. Given the increasing cross-border securities transactions, however, some extraterritoriality is inevitable. The question is, therefore, how far one's jurisdiction should reach. Instead of rule-based approaches such as the market-based approach and the modified market-based approach described below, I propose that securities regulators should decide, by mutual consultation, whether extraterritorial application is reasonable on a case-by-case basis.

#### *a. Market-Based Approach*

Under the market-based approach, the law of the jurisdiction where a transaction occurs should apply to the transaction, so the approach bars application of U.S. anti-fraud provisions if investors trade securities on a foreign securities exchange.<sup>154</sup> The approach argues that regulators should only be concerned about conduct that has effects within their jurisdiction.<sup>155</sup> It also argues that rational investors and issuers can choose securities markets where regulation is at the optimal level, thereby maximizing global welfare.<sup>156</sup>

The market-based approach provides certainty as to the applicable law by giving only one jurisdiction the power to enforce securities regulations, thereby avoiding regulatory overlaps and accompanying costs.<sup>157</sup> This approach, however, may not work in regulating market misconduct. Market misconduct in one place may have an adverse effect in other places, so regulators have a strong interest in regulating misconduct regardless of the jurisdiction of the direct effects.<sup>158</sup>

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<sup>153</sup> See *supra* Section III.B.

<sup>154</sup> See, e.g., Choi & Guzman, *supra* note 97, at 222 (claiming that any transactions occurring in a foreign jurisdiction should follow the law of that jurisdiction).

<sup>155</sup> See Beyea, *supra* note 10, at 157 (observing that the approach focuses on the effects, and it would result in discarding the conduct test).

<sup>156</sup> See *id.* (observing that under the approach the best way to maximize global welfare is to rely on securities markets to select the optimal level of regulation).

<sup>157</sup> See *id.* (observing that the approach will reduce the costs of offering securities and in turn allow the better price of securities for investors).

<sup>158</sup> See *id.* (explaining that securities markets are interconnected, and regulators have interest in deterring fraud that does not directly harm their markets).

*b. Modified Market-Based Approach*

Under the modified market-based approach, the law of the jurisdiction where a transaction occurs should presumptively apply to the transaction, but the presumption is rebuttable if the SEC can determine that a jurisdiction lacks effective anti-fraud enforcement.<sup>159</sup> Securities law Professor Choi and conflicts law Professor Silverman reason that jurisdiction should be based on the country that regulated the market where the transaction took place, and U.S. courts should presumptively exclude foreign investors who engage in transactions in non-U.S. markets from U.S. class-action lawsuits.<sup>160</sup> They also argue that the SEC, not the courts, has the expertise to make a case-by-case judgment about the effectiveness of the securities regulatory system in other jurisdictions.<sup>161</sup>

The approach should provide greater certainty to not only U.S. but also foreign issuers and investors without unduly conflicting with interests of other jurisdictions.<sup>162</sup> This approach may also be practical because it will limit the role of judges and reduce the possibility that different judges will make inconsistent decisions.<sup>163</sup>

Limiting extraterritorial application of U.S. anti-fraud provisions may reduce criticisms of the U.S. approach, but the overall issues of regulatory overlap will not be solved unless all jurisdictions adopt the market-based approach.<sup>164</sup> Moreover, limiting application can result in overly broad extraterritorial application if the SEC considers regulation in other jurisdictions to be insufficient, which is likely in many cases.<sup>165</sup>

*c. “Reasonable” Extraterritorial Application*

As described in Section III.A.1.b above, theoretically both the SEC and the DOJ could apply anti-fraud provisions extraterritorially based on the effects or conduct test under the Dodd-Frank Act. There are, however, strong arguments that such exercise should be more restricted

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<sup>159</sup> See generally Stephen J. Choi & Linda J. Silberman, *Transnational Litigation and Global Securities Class-Action Lawsuits*, 2009 WIS. L. REV. 465 (2009).

<sup>160</sup> *Id.* at 492–93.

<sup>161</sup> *Id.* at 503.

<sup>162</sup> See Beyea, *supra* note 10, at 159 (noting that the modified approach is better).

<sup>163</sup> Choi & Silberman, *supra* note 159, at 500–01.

<sup>164</sup> See Beyea, *supra* note 10, at 159 (stating that “the overall problem of a transaction being subject to multiple regulatory systems would not go away.”).

<sup>165</sup> *Id.*

or at least limited to a “reasonable” level. For example, securities law Professor Chang argues that a U.S. court’s jurisdiction should be limited to cases where the interests of U.S. investors and markets are sufficiently affected by foreign transactions.<sup>166</sup> Similarly, securities law Professor Painter argues that application of U.S. insider trading law would be justifiable when misappropriated information is used in the United States.<sup>167</sup> He reasons that such misappropriation would undermine the integrity of U.S. securities markets, but the U.S. interest in enforcement would be attenuated if only the misappropriation, but not the trading, occurs in the United States.<sup>168</sup>

Attempts to unilaterally police international markets through overly aggressive extraterritorial application of its laws could destroy the goodwill toward international cooperation and diminish respect for the rules and customs of foreign markets.<sup>169</sup> On the other hand, to eliminate regulatory overlaps by completely abandoning the extraterritorial application of broad anti-fraud rules, such as Rule 10b-5, can result in another significant problem, a regulatory gap.<sup>170</sup> The ideal solution, therefore, is for securities regulators to cooperate and coordinate to minimize issues caused by regulatory overlap and regulatory gaps. Assertions of a “reasonable” level of extraterritorial application of U.S. securities regulation may encourage international cooperation and lead to more agreements among securities regulators to resolve conflicts.<sup>171</sup>

## 2. *International Cooperation and Coordinated Enforcement*

Securities regulators can cooperate and coordinate to achieve a “reasonable” level of extraterritorial application of their securities laws through their existing international cooperative framework, the IOSCO and the MMoU. In securities regulation, there seems to be unanimous agreement among regulators, academics, market participants, and practitioners that the regulatory framework for international securities transactions requires regulators to coordinate and cooperate with each

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<sup>166</sup> Kun Young Chang, *Multinational Enforcement of U.S. Securities Laws: The Need for the Clear and Restrained Scope of Extraterritorial Subject-Matter Jurisdiction*, 9 FORDHAM J. CORP. & FIN. L. 89, 120–21 (2003).

<sup>167</sup> Painter, *supra* note 143, at 220.

<sup>168</sup> *Id.*

<sup>169</sup> See Chang, *supra* note 166, at 118 (claiming that exercise of extraterritorial application over cross-border transactions would implicate significant policy issues).

<sup>170</sup> See *supra* Section II.A.4 (describing problems caused by regulatory gaps).

<sup>171</sup> Beyea, *supra* note 10, at 166.

other.<sup>172</sup> There is, however, little agreement as to what form such international cooperation should take.<sup>173</sup>

In determining whether to exercise jurisdiction, the legitimate interests and concerns of other regulators should be recognized so that it does not conflict with their ability to regulate.<sup>174</sup> “Where regulators in multiple jurisdictions have an interest in the same suspected misconduct, they may wish to pursue a joint investigation and/or coordinate enforcement action[. . .] take advantage of their respective powers to obtain information[, and] benefit from the ability to conduct a more comprehensive cross-border investigation.”<sup>175</sup>

One of the notable examples of successful coordinated enforcement can be seen in the field of anti-corruption—a global settlement by Siemens for the violation of anti-bribery provisions—which exceeded USD \$1.6 billion in disgorgement and fines.<sup>176</sup> There, the SEC leveraged the prior investigation of German prosecutors and conducted a further joint investigation, and together, the SEC, the DOJ, and the Office of the Prosecutor General in Munich reached a coordinated settlement while the FSA and the HKSFC assisted the investigation.<sup>177</sup> In *SEC v. McClellan*, described above, the SEC took civil enforcement against U.S. residents while the FSA filed criminal charges against U.K. residents.<sup>178</sup> The problem of duplicate recovery may be overcome if affected regulators discuss whether sanctions are complementary or contradictory, and enter into a negotiated settlement or take actions against different parties to eliminate the possibility of duplicate recovery.<sup>179</sup>

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<sup>172</sup> See, e.g., Henry Klehm III et al., *Securities Enforcement Has Crossed the Border: Regulatory Authorities Respond to the Financial Crisis with a Call for Greater International Cooperation, but Where Will That Lead?*, 13 U. PA. J. BUS. L. 927, 928 (2011) (observing that regulatory authorities worldwide have almost universally agreed to coordinate and cooperate with each other).

<sup>173</sup> Beyea, *supra* note 10, at 160 n.145.

<sup>174</sup> Chang, *supra* note 166, at 118.

<sup>175</sup> IOSCO Report, *supra* note 146, at 4. Securities practitioners also requested the IOSCO to streamline cross-border enforcement. See generally INT’L BAR ASS’N, REPORT OF THE TASK FORCE ON EXTRATERRITORIAL JURISDICTION 300-01 (2009) [hereinafter IBA REPORT].

<sup>176</sup> Klehm et al., *supra* note 172, at 944–45.

<sup>177</sup> *Id.*

<sup>178</sup> See *supra* notes 126–131 and accompanying text.

<sup>179</sup> See Buxbaum, *supra* note 145, at 60 (claiming that duplicate recovery may be avoided by coordination); see also IOSCO Report, *supra* note 146, at 4–5 (claiming that

Choi and Guzman argue that the ideal approach would apply the laws of only one jurisdiction.<sup>180</sup> An approach to allocate exclusive jurisdiction to the country where a harm is recognized,<sup>181</sup> however, would not work because the mere fact that a harm was suffered does not mean that the country is best suited to regulate the conduct.<sup>182</sup> Similarly, many practitioners have argued that a single regulator should take the lead in the investigation and prosecution while other regulators should defer to the lead regulator because of the interests of comity, resources, efficiency, fairness, and a decisive solution.<sup>183</sup> It makes sense to designate the lead regulator, but the guiding principle of coordinated enforcement should not mandate a sole regulator to enforce its laws. Instead, the guiding principle should encourage or give incentives for all regulators not to pursue their objectives at the expense of other regulators.<sup>184</sup>

#### IV INTERSECTION OF ADMINISTRATIVE AND CRIMINAL ENFORCEMENT

Many securities regulators have criminal penalties as a tool of enforcement but not administrative penalties—which is one of the sources for regulatory gaps.<sup>185</sup> As discussed above, the introduction of administrative enforcement would allow securities regulators to have more flexibility and efficiency in their enforcement.<sup>186</sup> However, administrative enforcement may bring additional risks that require attention and cooperation between securities regulators, particularly where “quasi-criminal” administrative enforcement tools are used.

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coordinated enforcement will achieve better results by resolving a matter through complementary remedies).

<sup>180</sup> Choi & Guzman, *supra* note 97, at 228–29.

<sup>181</sup> See, e.g., Diane Wood, *A Cooperative Framework for National Regulators*, 72 CHL-KENT L. REV. 521, 530 (1996) (“I think that the optimal enforcer for any competition case is the country whose consumers are harmed by the particular practice in question.”).

<sup>182</sup> Guzman, *supra* note 15, at 905.

<sup>183</sup> See, e.g., IBA REPORT, *supra* note 175, at 301 (urging governments to “agree upon a framework that provides for one jurisdiction to be the appropriate jurisdiction”).

<sup>184</sup> See Guzman, *supra* note 15, at 898 (claiming that the successful choice-of-law principle should give incentives to regulators not to pursue their objectives at the expense of other countries).

<sup>185</sup> See *supra* Section II.A.2.

<sup>186</sup> See *supra* Section II.B.3.

### ***A. Challenges in Administrative Enforcement***

We need to note that administrative enforcement can cause additional issues. First, the lack of various sanctioning powers seems to be a common issue among regulators. In some countries, such as Australia and Canada, the regulator has direct authority to impose “administrative” sanctions on any persons;<sup>187</sup> in other countries, such as Hong Kong and Singapore, the regulator has direct authority only over regulated persons. In these countries, a regulator can file a civil action only against nonregulated persons.<sup>188</sup> In some countries, such as Jamaica, the regulator can seek cease-and-desist orders in court but not monetary penalties.<sup>189</sup> While in other countries, such as Spain, only the government has the authority to impose sanctions for serious breaches of securities regulation, and the securities regulator can impose sanctions only for minor infringements.<sup>190</sup>

Second, even if regulators have the power to impose administrative sanctions, the range of available sanctions may not be adequate if they are either (1) not severe enough, such as monetary penalties that are too low to have any deterrent effects;<sup>191</sup> or (2) overly severe, which may be the case if de-licensing is the only available sanction.<sup>192</sup> In the former case, criminal sanctions would still work as effective deterrence. The possibility of criminal proceedings, despite the difficulties described above, is indispensable for effective deterrence because some sanctions such as imprisonment, extradition for trial, and deportation may not be available in civil or administrative proceedings.<sup>193</sup>

Third, the ability to settle a case is also an important option, but in many civil law countries securities regulators do not have that authority.<sup>194</sup> Settling cases requires the regulators to exercise a certain level of confidence and credibility. Without this confidence and credibility, parties lack the incentive to settle. However, many regulators are not in a position to settle cases regularly even if they have

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<sup>187</sup> Carvajal & Elliot, *supra* note 14, at 19–20.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 20.

<sup>190</sup> *Id.* at 20–21.

<sup>191</sup> *Id.* at 21. For example, the securities regulator in Finland can only apply a maximum fine of €100 regardless of the offense. *Id.*

<sup>192</sup> Carvajal & Elliot, *supra* note 11, at 33–34.

<sup>193</sup> Carvajal & Elliot, *supra* note 14, at 21.

<sup>194</sup> *Id.*

such authority.<sup>195</sup> Regulators must have a track record of successful enforcement, clear guidelines for settlement, negotiation skills, and sufficient political will to vigorously pursue enforcement and withstand criticism for not imposing harsher penalties.<sup>196</sup>

Fourth, coordination between criminal and administrative authorities is also a key to success. Criminal and administrative authorities can share information and resources, and they can take parallel proceedings as necessary.<sup>197</sup> For example, in Singapore, the Monetary Authority of Singapore (MAS) and the Commercial Affairs Department (CAD) have conducted joint criminal and civil investigations since March 2015.<sup>198</sup> Previously, the MAS would pursue civil investigations independent of the CAD and, in turn, the CAD would pursue criminal investigations independent of the MAS.<sup>199</sup> As of March 2015, the MAS and the CAD can jointly investigate all market misconduct and make a decision as to whether a case is subject to criminal or civil proceedings when investigations have concluded.<sup>200</sup>

In practice, however, coordination and cooperation between criminal and administrative authorities remain a challenge in many countries.<sup>201</sup> Resources may be limited, prosecutors' interests and priorities may vary, and some authorities could also be legally constrained from sharing certain kinds of confidential information.<sup>202</sup> Administrative investigators may lack expertise in gathering evidence that satisfies the more rigorous requirements of criminal proceedings.<sup>203</sup>

### ***B. Quasi-Criminal Enforcement?***

If a sanction is labeled as “administrative” under domestic laws, it could hinder information exchange with regulators that construe a sanction as “quasi-criminal”—even raising double jeopardy concerns.

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<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 22.

<sup>198</sup> MONETARY AUTH. OF SING., CAPITAL MARKETS ENFORCEMENT 8 (2016).

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> Carvajal & Elliot, *supra* note 14, at 22.

<sup>202</sup> *Id.* Information exchange could also be subject to constitutional limitations such as the privilege against self-incrimination. *See infra* note 214 and accompanying text (a case in Hong Kong in which the plaintiff alleged that the Hong Kong regulator unconstitutionally provided self-incriminatory evidence to the Japanese regulator).

<sup>203</sup> Carvajal & Elliot, *supra* note 14, at 22.

### *1. Information Exchange*

Regulators need the authority to obtain all the necessary information and documents for enforcement actions, but international information exchange may be hindered when a securities regulator introduces “quasi-criminal” sanctions. Some securities regulators may introduce administrative penalties to have more flexibility and efficiency in their enforcement; other securities regulators that already have an option to initiate administrative proceedings may try to strengthen the deterrence effect by raising the upper limit of administrative monetary penalties as Japan has recently done.<sup>204</sup> As a result, though such enforcement tools are labeled as “administrative” under certain domestic laws, they could be construed as “quasi-criminal” in other jurisdictions, thereby implicating constitutional issues such as the privilege against self-incrimination. The more that administrative penalties are enhanced, the more likely they will be deemed quasi-criminal.

In the United States, parallel proceedings of criminal and administrative or civil proceedings are generally allowed.<sup>205</sup> However, evidence obtained through the less demanding procedures usually allowed for administrative investigations may not be used in criminal proceedings if the administrative investigations were conducted “solely” to obtain evidence for the criminal proceedings.<sup>206</sup>

Similar issues may arise in cross-border cooperation. A case in Singapore shows how a proceeding can be conceived in a way that affects international cooperation.<sup>207</sup> Under Section 3(b) of the Evidence (Civil Proceedings in Other Jurisdictions) Act of Singapore, assistance to foreign authorities may be allowed only if the High Court of Singapore is satisfied that the evidence will be “obtained for the purposes of civil proceedings which either have been instituted before the requesting court or whose institution before that court is

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<sup>204</sup> For example, the 2013 Amendment Act defined the administrative monetary penalty for insider trading committed as part of the asset management as three months’ management fees. See Sadakazu Osaki, *Regulatory Reform in the Wake of Insider Trading Incidents Related to Public Offerings of New Shares*, NRI PAPERS No. 190, 6 (Nov. 1, 2013).

<sup>205</sup> See Persaud, *supra* note 4, at 79 (observing that the courts held such purpose did not constitute legitimate parallel investigations).

<sup>206</sup> See *id.*

<sup>207</sup> See *Sec. & Exch. Comm’n v. Ong Congqin Bobby & Another*, [1998] 3 SLR(R) 19 (Sing.).

contemplated.”<sup>208</sup> Singaporean residents challenged the SEC’s request, claiming that U.S. civil proceedings instituted by the SEC would be characterized as criminal in nature.<sup>209</sup> However, the court held that assistance could be provided because the civil penalties were penal in nature as the money collected would go to the Treasury, not injured persons, but injunctive relief would be civil in nature both under Singapore and U.S. laws.<sup>210</sup>

Similarly, in Hong Kong, securities regulators can obtain and use self-incriminatory evidence on condition that they will not use such evidence in criminal proceedings.<sup>211</sup> In early 2016, a Hong Kong investor filed with the Hong Kong High Court for a judicial review, alleging that the Hong Kong regulator unconstitutionally provided self-incriminatory evidence to the Japanese regulator for use in administrative proceedings.<sup>212</sup> The Court, however, held that the Japanese proceedings are “non-criminal and non-penal in character and properly categorized as administrative or regulatory proceedings.”<sup>213</sup>

## 2. *Implication to International Double Jeopardy*

Due to the international double jeopardy principle, imposition of not only a criminal penalty but also a “quasi-criminal” administrative or civil monetary penalty in one country might prohibit the other country from imposing a penalty. In the United States, the *Hudson* decision largely resolved this issue by permitting multiple penalties.<sup>214</sup>

Developing law in Europe, however, seems to be going in the opposite direction. A district court in Paris recently held that French authorities could not prosecute French companies whose parent companies had signed either a deferred prosecution agreement or a non-prosecution agreement with the DOJ, though these agreements are the result of out-of-court negotiations and not an acquittal or

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<sup>208</sup> Evidence (Civil Proceedings in Other Jurisdictions) Act of Singapore, 1979 § 3(b). (Act No. 18/1979) (Sing.).

<sup>209</sup> Sec. & Exch. Comm’n v. Ong Congqin Bobby & Another, [1998] 3 SLR(R) 19, 19 (Sing.).

<sup>210</sup> *Id.* ¶¶ 9–16.

<sup>211</sup> See Securities and Futures Ordinance, (2002) Cap. 571, A609, § 186(6) (H.K.) (prohibiting the SFC from providing incriminating evidence for use in criminal proceedings outside Hong Kong).

<sup>212</sup> AA and EA v. Sec. & Futures Comm’n, [2019] 41 H.K.C. 246, 8–11 (C.F.I.) (May 5, 2016) (deciding to commence the judicial review proceedings).

<sup>213</sup> Judgment, AA, EA, Securities and Futures Commission, and Secretary for Justice, HCAL 41/2016, at 185 (Feb. 11, 2019).

<sup>214</sup> *Hudson v. United States*, 118 S. Ct. 488, 496 (1997) (holding that civil sanctions are not “criminal punishment” to trigger the protection of the Double Jeopardy Clause).

conviction.<sup>215</sup> In 2014, the European Court of Human Rights ruled that “administrative” penalties imposed by the Italian securities regulator precluded a criminal prosecution.<sup>216</sup> These cases suggest that an administrative or a civil monetary penalty—or even a negotiated settlement—may prevent another regulator from pursuing enforcement.

**CONCLUSION:  
FROM REGULATORY GAPS AND OVERLAP TO  
REGULATORY COMPLEMENT**

Securities regulators need to consider various factors when combating cross-border market misconduct while also filling regulatory gaps and avoiding unnecessary regulatory overlaps. They should meet at the earliest possible stage of investigation to determine whether enforcement interests and sanctions are overlapping, complementing, or conflicting. Thus, I propose the following guideline provisions to be incorporated in the MMoU:

If an authority initiates enforcement activity that may affect important interests of any other authority, the first authority will notify and discuss with the other authority as promptly as possible to decide the best course of action, taking into account whether:

- Regulatory interests are diverging or conflicting;
- A joint investigation or separate investigations are warranted;
- One of the Authorities should take a leading role in the investigation;
- Contemplated remedies could nullify the other Authority’s investigation due to international double jeopardy or similar concerns;
- There is any limitation to share information, including whether a proceeding of the requesting Authority would likely be considered as “quasi-criminal”;
- Contemplated sanctions are duplicate, complementary, or contradictory;

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<sup>215</sup> See Frederick T. Davis, *International Double Jeopardy: U.S. Prosecutions and the Developing Law in Europe*, 31 AM. U. INT’L L. REV. 57, 77–78 (2016) (describing the case).

<sup>216</sup> See *id.* at 73 (citing *Grande Stevens v. Italy*, Eur. Ct. H.R. (2014)).

- A global settlement is desirable, including whether the relevant Authorities can share penalties and recoveries equitably; and
- Authorities could take actions on different persons involved or different conduct.

Regulatory gaps and overlaps relate to each other because if regulators assert extraterritorial application too broadly, it causes regulatory overlaps, and, possibly, jurisdictional conflict. On the other hand, if regulators assert extraterritorial application too narrowly, it makes it easier for opportunists to tailor transaction structures to avoid regulation, thereby causing regulatory gaps.<sup>217</sup> When a regulatory gap or regulatory overlap occurs, interests of each regulator are not aligned. Their interests may either conflict, complement, or diverge from one another. Through coordination and cooperation, regulators can transform regulatory gaps and overlaps into regulatory “complements” where regulators assist each other to fill gaps and reduce inefficient overlaps.

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<sup>217</sup> Beyea, *supra* note 10, at 156.